79-966

No.

Supreme Court, U. S.
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In the

Supreme Court of the United States

GUS LYKOS, MIKE BOUSIS, GEORGE BOUSIS, HELEN BOUSIS, MARIA BOUSIS, CATHERINE LYKOS,

Petitioners,

vs.

AMERICAN HOME ASSURANCE COMPANY, a New York Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

GUS LYKOS, MIKE BOUSIS, GEORGE BOUSIS, HELEN BOUSIS, MARIA BOUSIS, CATHERINE LYKOS,

Petitioners,

vs.

AMERICAN HOME ASSURANCE COMPANY, a New York Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS PRAY THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS RENDERED IN THE ABOVE-ENTITLED CAUSE ON SEPTEMBER 21, 1979.

CITATIONS TO THE OPINIONS BELOW

The above-entitled case was originally brought in the United States District Court for the Northern District of Illinois. The decision granting judgment *non obstante veredicto* is reported at 452 F. Supp. 533. The appeal from that judgment to the United States Court of Ap-

peals for the Seventh Circuit was decided by an unreported order on July 30, 1979. The court subsequently decided, in ruling against the plaintiffs-appellants on a Petition for Rehearing, to issue the decision as an opinion. That affirmance is listed without publication at 605 F.2d 559. Both opinions are included in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The decision of the Circuit Court of Appeals was rendered in an unpublished order entered July 30, 1979. A timely petition for rehearing was filed and was denied on September 21, 1979. This Petition for Certiorari was filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a Judge of the United States District Court may, solely because of a difference of opinion with a jury as to the proper inferences to be drawn from the evidence adduced at trial, grant judgment *non obstante veredicto.*

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment VII, United States Constitution

AMENDMENT 7

Trial by jury in civil cases.—In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

RULE 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the U.S. shall be preserved to the parties inviolate.

RULE 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with his motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT OF FACTS

This is an action by the petitioners, Gus Lykos, Mike Bousis, George Bousis, Helen Bousis, Maria Bousis and Catherine Bousis to recover from the defendant, American Home Assurance Company for the losses that they suffered as a result of the fire at their place of business, styled Tino's Restaurant and Lounge.

In 1970, the petitioners purchased, with borrowed money, a restaurant then known as The Rainbow Inn, located in Hoffman Estates, Illinois. They chose in 1974 to make their restaurant a more elegant one, and so borrowed yet more money in order extensively to remodel and refurbish the existing bar and dining area. The renovated facility, Tino's Restaurant and Lounge, was opened on December 17, 1974.

On March 31, 1975, less than four months later and just as the new business was beginning to grow and to improve its financial situation, an unknown arsonist set fire to the restaurant, causing extensive damage to the equipment and furnishings, and completely disabling the petitioners from engaging in their livelihood. The following morning Bruce Elliott, a representative of the Insurer, contacted Gus Lykos and was given the name of his bookkeeper, Tom Glessner. A few days later, Elliott returned and he and Lykos inspected the premises. Elliott instructed Lykos to have his public adjuster contact him. Lykos never saw or was contacted by the Insurer thereafter.

Gus Lykos, a native of Greece, hired Gayle Olson Jr., a public adjuster, to do everything that was necessary to prepare the claim and submit it to the Insurer. He left the matter totally with Mr. Olson thereafter. In this regard, Mr. Olson consulted with the accountant, Tom Glessner, the broker, Theodore Rummell, and Mr. Lykos himself. Assisted by Tom Black, a general contractor, Olson investigated the matter and prepared an itemized and detailed inventory of all of the equipment, personal property, contents in the restaurant and damages to the building. Olson supervised the whole investigation, determined the cost of all items, met with the accountant to determine the business interruption claim, and ultimately prepared the claim for loss. Olson determined the total loss suffered by the plaintiffs as $395,805.22, which total included $188,711.37 for damages for contents, $167,390.39 for damages to the building, and $39,703.56 for lost profits.

The evidence at trial indicated that a few items had been duplicated in preparing those claims; however, by Olson's uncontroverted testimony, that duplicity resulted from the claims having been prepared by more than one individual. Similarly, it appears that some items were valued at a figure somewhat higher than the purchase price.

Having arrived at an approximate dollar amount of loss to the petitioners, Olson attempted to arrange a meeting with Elliott, the representative of the respondent insurance corporation, who had originally contacted Gus Lykos. Elliott refused to discuss any aspect of the claim, except to state that American Home Assurance Company denied any liability. Thereupon, petitioners brought this cause of action to require the Insurer to recompense them in accordance with the terms of their valid insurance contract for losses suffered as a result of the March, 1975 fire.

REASONS FOR GRANTING THE WRIT

The question of whether or not a trial judge may enter a verdict *non obstante veredicto* solely because of a difference of opinion with the jury over the inferences to be drawn from disputed facts is, frankly, not a novel question. It has been argued many times, and courts at all levels have ruled upon the issue, establishing what has been thought to be a settled body of law. These petitioners do not ask that this Court grant a Writ of Certiorari in order that it might reiterate what seems to have been stated clearly in the past.

The question presented in this Petition is, however, a substantial and important one, for, as the opinions of the courts below indicate, the long-recognized principle that issues of fact, when they exist, are to be decided by a jury has been disturbed, and in an alarming fashion. Certiorari should be granted in this case in order that the right to a meaningful trial by jury, guaranteed in the Constitution and reasserted in the Federal Rules of Civil Procedure, will not be denied these petitioners. Simply stated, the Constitution does not permit a trial judge or an appellate court to usurp the fact-finding duty of the jury. Nonetheless, the judges who have previously heard this case have done precisely that. This Court, by restoring the verdict of the jury in the case herein presented, can affirm the long and continuing federal policy favoring jury trials, and will call a swift and sure halt to an incipient encroachment upon that policy by the judiciary, an encroachment about which Mr. Justice Black warned almost forty years ago.

THE PETTTIONER'S RIGHT TO A MEANINGFUL TRIAL BY JURY WAS DENIED BY THE GRANTING OF A JUDGMENT NON OBSTANTE VEREDICTO SOLELY BECAUSE OF A DIFFERENCE OF OPINION WITH THE JURY OVER THE PROPER INFERENCES TO BE DRAWN FROM DISPUTED TESTIMONY.

The Seventh Amendment to the United States Constitution grants an important right—the right to trial by jury in civil cases. Justice Brennan, in an opinion for the Court in *Colgrove* v. *Buttin,* 413 U.S. 149 (1973), quoted from *Parsons* v. *Bedford,* 3 Pet. 433 (1830) to emphasize the great significance of this fundamental right: "One of the strongest objections originally taken against the United States Constitution was the want of an express provision securing the right of trial by jury in civil cases." *Colgrove,* at 152-153, citing *Parsons,* at 455. Justice Marshall (joined by Justice Stewart), dissenting in *Colgrove* but no less zealous in guarding the Seventh Amendment, alluded to Justice Blacks' dissent in *Galloway* v. *United States,* 319 U.S. 372 (1942) wherein Justice Black decried "the gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Colgrove* at 166, citing *Galloway* at 397. Indeed, this Court has throughout its history scrutinized closely and watched with great jealousy any encroachment upon the right to trial by jury. *Parsons,* at 455; *Colgrove,* at 188.

The right to a jury trial under the Seventh Amendment and rule 38(a) of the Federal Rules of Civil Procedure is not absolute. This Court held in *Galloway, supra,* that in a case where there were no disputed facts,

and only one inference could be drawn from those facts, the judge need not submit the case to a jury. Federal Rule of Civil Procedure 50(b) allows a litigant to move for a verdict notwithstanding the judgment when that party has not prevailed with the jury. The trial judge may grant such a motion when it is evident that the testimony given at trial leads to only one conclusion, and that the jury failed to reach that verdict. Under no other circumstance has this Court approved the taking of a determination of facts from the jury. The Court has, moreover, cautioned the judiciary that it should not substitute its version of the facts for that of the jury, whose province it is to weigh and balance the testimony. *Bayliss* v. *Traveller's Insurance Company,* 113 U.S. 316 (1884); *Hodges* v. *Easton,* 106 U.S. 408 (1882); *Barney* v. *Schneider,* 76 U.S. 248 (1869); *Bailey* v. *Vermont Central Railway,* 319 U.S. 350, 353 (1942). Although the Court no longer requires, as it once did, that any discrepancy, however slight, must go to the jury, this Court has firmly insisted that in any case where fair-minded men might reach different conclusions, the case should be decided by the trier of facts. *Bailey,* at 353. *Washington & Georgetown Railroad Co.* v. *McDade,* 153 U.S. 554, 572 (1893). It is then, clear as a matter of law that the Constitution forbids a trial judge from usurping the power vested in the trial jury.

Nevertheless, despite this well-settled law, the tribunals below have, in the case now presented to this Court, done nothing less than flagrantly to assume the functions of the finders of fact, doing so despite the existence of substantial controversy in the testimony and the variety of inferences which reasonable persons might draw therefrom. It was as if the jury had never existed at all.

After an extensive trial the jury awarded the petitioners $327,000 of the $395,805.22 claimed. In granting a judgment *non obstante veredicto,* the trial judge stated that the verdict was "manifestly against the weight of evidence" (App. 1a-8a); that the claim was made "with the intent to cheat and defraud"; that it was implausible, based upon the testimony, "that someone other than the plaintiffs or their agents could have entered the building, spread gasoline throughout the restaurant and left without leaving a trace of forced entry or exit in such a short period of time." (App. 1a-8a), and that "the total evidence introduced in the trial of this action showed a definite plan by plaintiffs and Gale Olson to file false claims for fire losses and an intent to defraud defendant . . . (App. 1a-8a). The Court of Appeals, while not discussing the arson evidence, agreed that the plaintiffs' fraud and false swearing had been established as a matter of law. (App. 9a-14a). The Court of Appeals, ruling that the judgment notwithstanding the verdict was correct, noted that Illinois law governs the appropriate standard for taking a case away from the jury *Etling* v. *Sander,* 447 F.2d 593, 594 (7th Cir. 1971). The Illinois standard, as formulated in *Pedrick* v. *Peoria & Eastern R.R.,* 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967), is that "verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." (App. 9a-14a)

What emerges from the opinion of the District Court is the belief of the trial judge that the petitioners in-

tended from the outset to defraud their insurers, by setting fire to their place of business and by greatly exaggerating the claimed losses. The record in this case simply is not sufficient to justify taking the case from the jury. The proof as to the cited affirmative defenses is far from overwhelming.

The trial judge found that the claims were made with the intent to "cheat" and "defraud". The evidence indicates that several individuals were involved in assessing and evaluating the amount to be claimed, that the restaurant was in considerable confusion after the fire, and that Gus Lykos, unsophisticated in such matters, did as little as possible in making up the claim. And, while the evidence indicates that after extensive discovery and trial testimony certain items in the reports were over-valued, this Court's language in *Soler and Company* v. *United Firemen's Company of Philadelphia,* 299 U.S. 45 (1936) is dispositive on the matter of whether or not fraud has been proven herein. In specifying those mental states and attitudes of an insured that fall short of establishing the requisite wilfulness for fraud, the Court said:

> "Policyholders may present inaccurate proofs of loss without conscious dishonesty or intent to defraud; different views of values are common; memory is faulty; insurance company and assured often entertain widely different views concerning the policy; and evidence cannot always be produced to establish something declared to be true in entire good faith." [299 U.S. at 50.]

By substituting his own finding of intent to defraud for the jury's finding that such intent was lacking, and doing so in the face of a Supreme Court decision flatly

contrary to the conclusion reached as a matter of law, the trial judge has abbrogated the function of the jury. This, under our Constitution and settled case law, may not be done.

The opinion of the District Court evidences a strong belief that the plaintiffs were responsible for the fire from which the contested claims resulted. The jury, innundated with testimony on behalf of the defense designed to fuel just such a suspicion, decided that the facts were otherwise. The plaintiffs denied having set or caused the fire, and testimony was given indicating that any of the locks on the restaurant's doors could have been picked between the time of closing and the time the fire started. It is, in short, the plaintiffs' word and corroborating testimony pitted against the defendants' suspicions and corroborating testimony. The judge, in overruling the jury, substituted his own belief for theirs, although nothing in the record indicates that the jury finding was at all unreasonable, seemingly forgetting that it is the province of the jury to weigh and balance the testimony and not the court's. This District Court, however, has effectively disregarded the jury, and its proper function entirely. Such impropriety should not now be countenanced by this Court, which has for so long upheld the federal policy favoring jury trials. *Simler* v. *Conner,* 372 U.S. 221 (1963). *Dairy Queen Inc.* v. *Wood,* 369 U.S. 469, 479 (1961).

What beyond any doubt has occurred in this case is that a trial judge, confronted with a jury verdict in conflict with his view of the weight of evidence, has usurped the powers of that jury and made findings of fact more palatable to his version of the events over which the

contest was brought. Unless this be an unusual case in which the weight of evidence tilts so strongly in one direction or another, such usurption has often been condemned by this Court, and is blatantly offensive to the Constitution.

This Court is, then presented with an opportunity to affirm the system of jury trials in civil litigation and to insulate jury verdicts from attack merely because the trial or Appellate judges would prefer a different verdict. It is not enough that the trial judge disagrees with the jury finding—far more is necessary to sustain a judgment notwithstanding the verdict. It a jury verdict can be overturned simply because the trial court finds reasonable a different inference, there will no longer be value in the Constitutional right to have the merits of a claim or defense weighed and evaluated by fellow citizens, in whom our system of jurisprudence professes so much faith. The right to jury trial will have no meaning at all.

Denying this Petition will not, of course, sound the death knell of the jury trial in civil litigation in the United States. However, acquiesence in the trial court's judgment *non obstante veredicto* will be but another step in "the gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." By restoring the jury verdict in this case, that process of erosion can be stopped.

CONCLUSION

For all of the reasons set out above, petitioners respectfully request that this Petition for Writ of Certiorari should issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In The

UNITED STATES DISTRICT COURT

Eastern Division

GUS LYKOS, MIKE BOUSIS, GEORGE BOUSIS, HELEN BOUSIS, MARIA BOUSIS and CATHERINE LYKOS,

Plaintiffs,

vs.

AMERICAN HOME ASSURANCE COMPANY,

Defendant.

No. 76 C 692

MEMORANDUM AND ORDER

This case was tried before a jury and the jury returned a verdict in favor of plaintiffs. The cause now comes on upon the motion of defendant to set aside the verdict for plaintiffs and for a judgment *non obstante* in accordance with defendant's previous motion for a directed verdict or, in the alternative, for a new trial. The court has read and considered the motion and the memoranda of counsel for the parties filed in support of their respective positions thereon; has heard the argument of counsel; and is now fully advised in the premises.

Plaintiffs Gus Lykos, Mike Bousis, George Bousis, Helen Bousis, Maria Bousis and Catherine Lykos brought this action to recover on an insurance policy issued by the defendant American Home Assurance Company for damage arising out of a fire on certain business premises. Defendant denied the loss is covered under its policy and asserted certain affirmative defenses.

Upon trial the evidence showed plaintiffs owned a building in Hoffman Estates, Illinois, that had been newly remodelled and newly reequipped, and that plaintiffs owned and operated a restaurant on the premises known as Tino's Restaurant & Lounge in which both food and alcoholic beverages were served. Plaintiffs had obtained a policy of insurance with defendant American Home Assurance Company. It insured, *inter alia,* against loss by fire of the building, equipment and inventory, and against business interruption. The policy's limit was $550,000 and the policy was in fuull force and effect on March 31, 1975.

On or about March 31, 1975, plaintiffs suffered a fire loss at Tino's Restaurant & Lounge. The entire roof of the building was destroyed and caved in from the top. The building and much of the equipment therein was damaged by the fire and plaintiffs were no longer able to conduct business on the premises. Pursuant to the terms of the insurance policy, plaintiffs reported the loss and made claim for their loss with defendant in apt time. On February 13, 1976, defendant formally denied plaintiff's claim and thereafter plaintiff's brought this suit.

Upon trial the evidence showed that plaintiffs engaged Gale Olson, a public insurance adjuster, and had agreed to pay him 10 per cent of any recovery from defendant. Gale Olson had various conferences with Gus Lykos concerning plaintiffs' claims for losses. Based upon his memory and observations after the fire, Gus Lykos, together with Gale Olson, prepared a document purporting to be a sworn proof of loss and claiming three categories of losses: $167,390.29 for damages for the building loss; $188,711.37 for loss of contents, including food, liquor and equipment; and $39,703.56 for loss of gross earnings or business interruption. Plaintiffs then submitted to defendant a sworn statement in proof of loss for $395,-805.22, the total amount of their categories of claims.

The evidence showed a large number of items in the contents claim were overvalued. In preparation of the

claims, neither Gus Lykos or Gale Olson referred to bank records or other records of plaintiffs that were recovered from the fire by fire officials of Hoffman Estates and delivered to Gus Lykos, which records would have shown the amounts paid for supplies and equipment. Neither did either of them consult any of the merchants, wholesalers or other suppliers concerning purchases made by plaintiffs before the fire. Plaintiffs in their claims included numerous items of alcoholic beverages, meat and other food on hand in their inventory of supplies, detailing their value per bottle or per pound. Defendant subpoenaed the only suppliers of plaintiffs for those items with copies of invoices for the supplies; and upon trial defendant demonstrated without contradiction that in many instances plaintiffs had paid less per bottle for beverages, and less per pound for meat, than plaintiffs had set out in their claim filed under oath with defendant. In one instance plaintiff included a claim for a clock on which they placed a value of $2,000. Upon trial the only clock that plaintiff could show was damaged was a clock costing $200. Plaintiffs also included in their claim all their tables, chairs and dining room equipment. Pictures of the dining room introduced into evidence showed most of the tables and chairs intact after the fire.

The evidence also showed numerous duplications between the building and contents claims and many items overvalued by plaintiffs. Upon trial plaintiffs contended each of the three claims included in the proof of loss was an estimate and removed certain duplications. However, plaintiffs made no attempt to explain or justify the very substantial difference between the amounts of money they claimed for losses as set forth in their claims, filed under oath with defendant, and the actual amounts paid by them as shown from the paid invoices of their suppliers.

Defendant denied plaintiffs' loss is covered under its policy and that it is indebted to plaintiffs in the amount of $395,805.22 or in any other amount. Defendant con-

tended that plaintiffs breached provisions of the insurance policy in that they misrepresented the amount of the loss in their sworn statement in proof of loss when in fact they knew the loss was less than $395,805.22. The defendant also contended that the plaintiffs breached the following provision of the insurance policy when, in their sworn statement in proof of loss, they swore the fire was of unknown origin when they then and there knew the fire was of incendiary origin. The policy, *inter alia,* provides:

> "*Concealment, fraud.* This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

In another of its affirmative defenses the defendant further claimed that plaintiffs breached the policy provisions in that they or someone acting on their behalf intentionally set fire to Tino's Restaurant & Lounge with the intent to cheat and defraud the defendant.

Plaintiffs contended they complied with all the policy's requirements and denied that they misrepresented the amount of the loss. They admitted the fire was intentionally set but denied that either they or their agent intentionally set the fire.

Plaintiffs not only claimed a loss of $395,805.22 in their sworn statement in proof of loss but later brought suit for the entire amount. It is clear from the evidence that plaintiff submitted the claim with the intent of receiving the total amount. The jury in its verdict for plaintiff assessed the damages for the contents loss in the sum of $125,000; the damages for the building loss in the sum of $163,000; and the damages for the loss of gross earnings in the sum of $39,000. This total of $327,000 is an amount significantly less than the amounts plaintiffs claimed, especially on the contents claim.

The ascertainment and assessment of the damages is a question of fact within the province of the jury as is fraud and false swearing; but there is a question of law when an insured misrepresentations cannot be seen as innocent. Plaintiffs had an obligation to honestly state under oath the extent of the damages. The evidence showed Gus Lykos knowingly and willfully concealed and misrepresented material facts and that he made false and fraudulent claims in preparing the claims. The total evidence introduced in the trial of this action showed a definite plan by plaintiffs and Gale Olson to file false claims for fire losses and an intent to defraud defendant by submission of a purported $395,805.22 loss.The exaggeration of the extent of the loss was willful and grounds for avoidance of any and all liability under the policy.

In plaintiffs' sworn statement in proof of loss, it was stated the fire was of unknown cause and origin. By the testimony of police and fire officers and other witnesses, it was shown that plaintiffs, particularly Gus Lykos, actively participated in the investigation of the fire. Upon trial plaintiffs admitted the fire was intentionally set but denied they or their agent intentionally set the fire and, according to plaintiffs, no one had a motive for committing the arson. When the restaurant was remodelled the locks were changed and only the three brothers who are plaintiffs here had keys to Tino's. The restaurant and lounge had been closed and secured about 12:15 A.M. The fire department responded to an alarm at 1:04 A.M. Gasoline had been spread throughout the restaurant, the washrooms and attic. When firemen arrived they found the doors locked and secured and they forcibly entered the restaurant and fought the fire. From the testimony of the fire investigation expert and fire department officials it appears implausible that someone other than plaintiffs or their agents could have entered the building, spread gasoline throughout the restaurant and left without leaving a trace of forced entry or exit in such a short period of time. The verdict as

returned by the jury is clearly against the manifest weight of the evidence.

The gross earnings-business interruption claim submitted by plaintiff was in excess of $39,000. The testimony of plaintiff's accountant and defendant's accountant revealed the restaurant was not profitable and was losing approximately $3,000 net a month. Although Tino's was losing money, plaintiffs submitted a claim for gross earnings loss. Evidence was also introduced that plaintiffs were in financial difficulties. Under the circumstances plaintiffs are not entitled to recover under the business interruption coverage; and the court finds this claim was made with intent to cheat and defraud defendant and that on this claim judgment must be entered for the defendant and against plaintiffs on the ground of fraud as a matter of law.

Plaintiffs knowingly and willfuly made misrepresentations and false statements and concealed material facts with intent to defraud defendant and this was a flagrant breach of provisions of the policy. By reason thereof, plaintiffs are not entitled to recover any sum under the insurance policy issued by American Home Insurance Company. The court has a responsibility to decide this case in accordance with the law. The law supports the defendant and the court is required to make a finding of fraud as a matter of law. *Esqiure Restaurant, Inc.* v. *Commonwealth Ins. Co. of N.Y.*, 393 F.2d 111 (7th Cir. 1968); *Gregory's Continental Coiffures and Boutique, Inc.* v. *St. Paul Fire & Marine Ins. Co.*, 536 F.2d 1187 (7th Cir. 1976); *Tenore* v. *American & Foreign Ins. Co. of N.Y.*, 256 F.2d 791 (7th Cir. 1958). A party should not be compelled to go to the Court of Appeals to have the law applied even if a jury has rendered a verdict.

The verdict returned by the jury was contrary to law and the evidence. The evidence adduced was overwhelmingly in favor of defendant and against plaintiff and the jury verdict was manifestly against the weight of the

evidence. This court in good conscience cannot let the jury verdict stand. In the event of an appeal and if this court is reversed on its decision to set aside the verdict and to order judgment in favor of defendant, then a new trial should be granted.

Before trial of this cause began, defendant American Home Assurance Company compromised and/or settled two claims for proceeds due under the insurance contract. James M. McArthur, Sr. and John T. McArthur held a mortgage on the building and land and said mortgages were additional insureds under the policy. The court takes judicial notice of a suit brought by said mortgagees in this court, claiming proceeds due under the policy. The case (numbered 76 C 1206, entitled *James McArthur, Sr. and John T. McArthur* v. *American Home Assurance Company*) was assigned to Judge Bernard M. Decker; and after the subject matter of that suit was settled, the case was dismissed. It was revealed in an informal pre-trial conference in the case before this court that the insurance company had paid the mortgagees, additional insureds, the sum of $124,000. Also, in the case before this court an intervening petition was filed by Spalter Finance Company, alleging plaintiffs were indebted to the finance company for unpaid balances on two notes and seeking to recover from American Home Assurance Company under a Lender's Loss Payable Clause, attached to and forming part of the policy. In its answer to the intervening petition, the defendant asserted an affirmative defense that it was willing to pay petitioner under the Lender's Loss Payable Clause in return for an assignment of the notes but that petitioner had failed and refused to execute full and complete assignments as required by defendant's policy. On June 19, 1977 the parties stipulated and agreed that the intervening petition of Spalter Finance Company be withdrawn. Prior to trial it was revealed that the insurance company had paid the finance company $1.000.

For all of the foregoing reasons, it is ORDERED that the motion of defendant to set aside the verdict for plaintiffs and to order judgment *non obstante veredicto* for defendant, in accordance with the previous motion for directed verdict, be and it hereby is granted. It is FURTHER ORDERED that the jury's verdict herein be and it hereby is set aside and that judgment be and it hereby is entered for defendant. It is FURTHER ORDERED that defendant's motion for a new trial be granted, this ruling to take effect only in the event that the ruling of this court on defendant's motion for judgment is reversed. Inasmuch as this court has expressed herein its views of this case, it would be improper for this court to preside at a re-trial of this cause.

ENTER:

/s/ J. S. Perry
Judge

Dated: June 21, 1978

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 78-1977

GUS LYKOS, et al.,

Plaintiffs-Appellants,

vs.

AMERICAN HOME INSURANCE COMPANY, a New York Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 692—J. SAM PERRY, *Judge.*

ARGUED APRIL 26, 1979—DECIDED JULY 30, 1979*

Before PELL, *Circuit Judge,* MOORE, *Senior Circuit Judge,*** and WOOD, *Circuit Judge.*

PER CURIAM. The plaintiff-appellants, Gus and Catherine Lykos, and Mike, George, Helen, and Marie Bousis, brought this action to recover on an insurance policy issued by the defendant-appellee, American Home Insurance Company, for damage arising out of a fire on certain premises. The defendant denied liability under the

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* This appeal was originally decided by unreported order on July 30, 1979. *See* Circuit Rule 35. The court has subsequently decided to issue the decision as an opinion.

** Honorable Leonard P. Moore, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

policy, asserting the defenses of (1) fraud and false swearing and (2) arson by the insured. The case was given to the jury over the defendant's motion for a directed verdict, and the jury returned a verdict in favor of the plaintiffs. The trial court, however, granted the defendant's motion for judgment *non obstante veredicto and,* in accordance with Fed. R. Civ. P. 50(c)(1), conditionally granted the defendant's motion for a new trial. We need not discuss the arson evidence, even though it overwhelmingly supports the defendant and would at least require a new trial, because we hold that the evidence at trial established the plaintiff's fraud and false swearing as a matter of law.

The insurance policy which is the subject of this action provides:

> *Concealment fraud.* This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Illinois law controls the substantive law on the defense of fraud, and the governing principle is that "[o]rdinarily, fraud and false swearing is a question of fact for the jury, but it becomes a question of law when the insured's misrepresentations cannot in any way be seen as innocent." *Folk* v. *National Ben Franklin Insurance Co.,* 45 Ill. App. 3d 595, 597, 359 N.E.2d 1056, 1057, 4 Ill. Dec. 104, 105 (1976). Illinois law also governs the appropriate standard for taking a case away from the jury. *Etling* v. *Sander,* 447 F.2d 593, 594 (7th Cir. 1971). The Illinois standard, as formulated in *Pedrick* v. *Peoria & Eastern R.R.,* 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). is that "verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary

verdict based on that evidence could ever stand." Our examination of the record convinces us that the trial court's entry of judgment for the defendant notwithstanding the jury's verdict met this stringent test. We recount below the facts essentially as detailed in the trial court's memorandum order granting judgment n.o.v.

The evidence at trial showed that the plaintiffs owned a building in Hoffman Estates, Illinois, which had been newly remodeled and equipped and where the plaintiffs operated a restaurant known as Tino's Restaurant & Lounge. The establishment served both food and alcoholic beverages. The business was insured by the defendant, and the policy insured against loss by fire of the building, equipment and inventory, and against business interruption.

On March 31, 1975, the plaintiffs suffered a fire loss at Tino's. A fire started in the attic of the building causing the roof of the building to collapse. The building and much of the equipment were damaged by the fire, and the plaintiffs were no longer able to conduct business on the premises. It is uncontested that the fire was the work of arsonists. Pursuant to the terms of the insurance policy, the plaintiffs reported the loss and made a timely claim for their loss with the defendant.

The plaintiffs engaged Gale Olson, a public insurance adjuster, and agreed to pay him ten percent of any recovery. Olson had various conferences with Gus Lykos concerning the losses. Based upon his memory and observations after the fire, Lykos, together with Olson, prepared a document purporting to be a sworn proof of loss and claiming three categories of loss as a result of the fire: $167,390 for damage to the building; $188,711 for damage to the contents of the building, including food, liquor, and equipment; and $39,703 for loss of gross earnings or business interruption. The plaintiffs then submitted a sworn statement in proof of loss totaling $395,805.

The evidence showed a large number of items in the contents claim to be overvalued. In preparation of the claim neither Gus Lykos nor Olson referred to bank or other records which were recovered from the fire by fire officials and delivered to Lykos and which would have shown the amounts paid for supplies and equipment. Neither did they consult any of the merchants, wholesalers, or other suppliers concerning purchases made by the plaintiffs before the fire. The claim included numerous items for alcoholic beverages and meats, detailing their value per bottle or per pound. The defendant subpoenaed the suppliers of those items and produced copies of invoices for the supplies. This evidence demonstrated without contradiction that in many instances the plaintiffs had paid appreciably less per bottle for beverages and less per pound for meat than the amounts claimed in their proof of loss filed under oath with the defendant. The quantities claimed were also considerably inflated. The plaintiffs included a claim for a clock which they valued at $2,200. At trial the only clock that the plaintiffs could show was damaged cost $200. The plaintiffs also included in their claim all their tables, chairs and dining room equipment. Pictures of the dining room introduced into evidence showed most of the tables and chairs intact after the fire.

The evidence also showed numerous duplications between the building and contents claims and many items overruled. The plaintiffs contended each of the three claims included in the proof of loss was an estimate, and they did remove certain duplications. The plaintiffs, however, made no attempt to explain or justify the very substantial difference between the amount of money they claimed for losses as set forth in their claim, filed under oath with the defendant, and the actual amounts paid by them as shown from the invoices of their suppliers. The plaintiffs not only claimed a loss of $395,805 in their sworn statement in proof of loss, but later brought suit for the entire amount. It is clear from the evidence

that plaintiffs submitted the claim with the intent of receiving the total amount.

We conclude, as did the trial court, that the evidence conclusively established a consistent pattern of inordinately excessive claims. After reviewing the record and giving all reasonable allowance for the possibility of innocent mistake, we are compelled to conclude that the claims were deliberately false. The misrepresentations can in no way be seen as innocent and no reasonable jury could find otherwise. *See Tenore* v. *American & Foreign Insurance Co.,* 256 F.2d 791 (7th Cir.), *cert. denied,* 358 U.S. 880 (1958).

The plaintiffs attempt to dismiss some of the misrepresentations as mere estimates for purposes of negotiation, and they suggest that the exaggerated claims would have been ironed out had the insurance company been willing to negotiate. They contend that the evidence, therefore, does not establish the requisite intent to defraud. Even assuming that the plaintiffs did not intend to recover more than their actual losses and merely exaggerated the extent of loss with an eye to settling, we think the proper rule is that

> a design on the part of the insured to gain a position of advantage in the settlement of the loss through false representation is a fraudulent design and the making of such representations knowingly for that purpose is an attempt to defraud . . . , even though the insured may not have expected or intended ultimately to obtain more than compensation for actual loss.

14 Couch on Insurance 2d § 49:556 (1965).

This court has previously stated that

> the insured, if he suffers a loss, must honestly state, under oath, the extent of his loss and give this information to the insurer. He must not make false

> proofs of loss with intent to defraud the insurer. Although the penalty is heavy and seemingly harsh, it is one way of stopping the presentation of false, fictitious or inflated claims. False and exaggerated claims seemingly go hand in hand with incendiarism. The court should therefore unhesitatingly act to prevent attempted frauds on the part of the insured.

Tenor, 256 F.2d at 794 (quoting *American Home Fre Assur. Co.* v. *Juneau Store Co.*, 78 F.2d 1001, 1003 (7th Cir. 1935)). The trial court's action was in conformity with this policy. Although a jury's verdict is not to be lightly overturned, in this case the evidence at trial permitted only one result: judgment for the defendant.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

The United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

September 21, 1979

Before

Honorable Wilbur F. Pell, Jr., Circuit Judge
Honorable Leonard P. Moore, Sr. Circuit Judge*
Honorable Harlington Wood, Jr., Circuit Judge

Gus Lykos, et al.,

Plaintiff-Appellant,

No. 78-1977 vs.

American Home Insurance Co.,
a New York Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76C692

J. Sam Perry, Judge.

ORDER

On consideration of the petition for rehearing filed in the above entitled cause by counsel for Plaintiff-Appellant, all of the Judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing B, and the same is hereby, DENIED.

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* The Honorable Leonard P. Moore, United States Senior Circuit Judge for the second Circuit is sitting by designation.